IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 804 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

RAMESHCHANDRA SHREERAMPRATAP TIVARI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 804 of 2000

MR BS SUPEHIA for Petitioners No. 1-2

THROUGH JAIL for Petitioners No. 1-2

MR VIPUL PANCHOLI, APP for Respondent No. 1

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 21/03/2002

CAV JUDGEMENT

1. The appellants have challenged the judgment and order of conviction and sentence passed by ld. Additional Sessions Judge, Surat in Sessions Case No. 34 of 1998 on 27.7.2000. Both the appellants are tried as original accused nos. 1 & 2 for the offences punishable

under sections 376, 366, 506(2) and Section 342 R/w Section 114 of the IPC. They are also tried for the offence punishable under Sections 3(1)(ii) of Schedules Caste & Schedule Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as the Atrocities Act). Though the ld. Trial Judge has acquitted both the accused for the offences punishable under the Atrocities Act, the Court has held both the accused guilty for all other offences punishable under sections 376, 366, 506(2) and Section 342 R/w Section 114 of IPC and vide impugned judgment, imposed R/I for 7 Years and a fine of Rs.2000/ each, I/d to undergo S/I for 8 months for the offence punishable under Section 376 of IPC, imposed R/I for 5 Years and a fine of Rs.1000/, I/d to undergo S/I for 4 months for the offence punishable under section 366 of IPC, imposed R/I for 2 Years and a fine of Rs.800/, I/d to undergo S/I for 2 months for the offence punishable under section 506(2) of IPC and imposed R/I for 6 months and a fine of Rs.400/, I/d to undergo S/I for 1 month for the offence punishable under Section 342 of IPC. Vide impugned judgment, it is also ordered by the ld. Sessions Judge that on payment of fine, an amount of Rs. 4000/ be paid to the complainant Savitaben as compensation. All the sentences were also ordered to run concurrently and both the appellants were given benefit of set off. It is this impugned judgment and order which is challenged by both the accused in this appeal.

2. I have heard ld. counsel Mr. Supehia appearing for the appellants-accused and ld. APP Mr. Pancholi for the State. To appreciate the grievance of the appellants, it would be proper to state the case of the prosecution in brief as reflected in the complaint i.e. FIR as well as the charge framed by the ld. trial Judge. Victim Savitaben is the complainant who lodged complaint at Umra Police Station, Surat City at about 20.40 hours on 1.4.1998. According to her, at the relevant time, she was aged about 23 years and was married with P.W. Imabhai Nurabhai Damor. Complainant, her husband Imabhai along with other labourers of their native place i.e. village Chakalia of Ta: Limdi, District : Dahod - Panch Mahals, had come to do labour work at Surat. On the date of incident, they were camping in open area near village Adajan. Prior to that, they had camped in the area known as Vesu Patiya. They used to shift and camp their stay from one place to another where they were getting labour work. Some other labourers of her in-laws' village Chakalia were also camping on those camp sites along with complainant and her family members. They had been to Surat since one month from the date of incident. Initially, they had camped near Vesu Patiya where the

construction of a school building was going on. Thereafter, on account of Holi festival, some of the labourers returned to their native village and work of construction of school was closed. So, they shifted their camp in the open space at village Adajan and other labourers who had not gone to their native place, had also shifted to that camp site along with the prosecutrix and her family members and were staying in that group. When victim girl Savitaben and other labourers were doing labour work at Vesu Patiya where construction of school building was going on, she came into contact with two persons who were working there as Watchmen namely Rameshchandra Tiwari and Rajesh Pande- accused in this case and she was knowing them since then. That on 31.3.1998, she had been to her place of stay in the camp referred to as "Padav" and her husband had gone for labour work. As she was not keeping well, she had not gone for labour work. In that evening, at about 6.00 P.M. both the accused know to the victim Savitaben and working as Watchmen at Vesu Patiya, came to her and informed her that her husband has met with an accident and, therefore, she should accompany them. Because of mental shock and frightening, she accompanied both of them and boarded in a rickshaw. Both of them took her at Vesu Patiya, dropped there and paid rickshaw fare and took her to a small room (Kholi) and ordered her to sit and gave threats to her that if she tries to shout, they would kill her husband. Her husband was not seen there. It was already sunset and dark and she could not found anybody else than the accused. As she was under fear, she could not shout. Thereafter, accused shut the doors and both of them caught hold of her and she was directed to take out her clothes, but she denied. At that time, she was abused and they forcibly taken out the petticoat of the victim and because of force used, petticoat was detached from stitches. Her bra was also forcibly removed and she was asked to sleep on a bench covered with a cotton mattress. According to her, thereafter, one of the accused namely Tiwari went outside the room and another accused namely Pande forcibly committed rape on her. After committing rape, accused Pande went out side the room and accused Tiwari entered and he also committed rape on her. According to victim Savitaben, both these accused, one after the another, repeatedly raped her against her wish and will and all the time they were giving threats to the victim Savitaben not to shout. According to her, both the accused had also played with fleshy parts of her body and it was a matter of great pain to her and, therefore, when she was about to shout, they also pressed her mouth with force. Ultimately at about 4.00 P.M. in the morning, she was asked to put on

her clothes. Thereafter, again she was threatened that she should not tell about the wrong committed by the accused and if she tells this story to any one else, her husband will be killed. Thereafter, she was kicked out from the said room. It is the say of the victim Savitaben that at that time, as ti was enough dark, she came to the main road and opted to sit there on the road itself till 10.00 A.M. At about 10.00 A.M. her brother-in-law (Diyer) P.W.. Jamu located her and asked her that way she is sitting there. At that time, she has not stated anything to Jamu. Thereafter, Jamu took her to the camping site. Her husband was not present. She came to know that he had gone in search of her. On his return in the evening, she disclosed and narrated the entire incident to him and thereafter in the late evening, compliant came to be filed. After investigation, both the accused were chargesheeted and after examining number of witnesses and scrutinising the various documents including panchanama, FSL report and explanation offered by both the accused, trial Judge has recorded above-referred finding holding both the accused guilty for the offence punishable under Section 376 of IPC.

3. Charge exh.63 in the paper book is clear and specific against both the accused and no submissions are made by the otherside on the point of legality and validity of the charges framed against the accused and allegations made therein.

4. Ld. counsel Mr.Supehia has taken me through the entire oral as well as documentary evidence led by the prosecution and has submitted that the finding recorded by the ld. trial Judge is wrong. Material errors have been committed by the ld. trial Judge in appreciating the oral as well as documentary evidence. Basic principle of appreciation of evidence has not been taken care of. Relevant decisions cited by the defence counsel have not been appreciated and number of points which are required to be considered by the trial Court advanced by the defence counsel, are not considered in the correct and proper perspective and in accordance with the basic principles of criminal jurisdiction. Finding recorded by the ld. trial Judge is one-sided. Ld. trial Judge ought to have held that late filing of FIR in the present case is fatal to prosecution and there is no reasonable explanation for not filing FIR immediately after the incident. Shadow of close relative of the victim Savitaben being police officer and his presence on the day of incident and on the date of filing of complaint at Camping site (Padav) or in the city of Surat itself, has

affected adversely the case of the prosecution. Witnesses examined by the prosecution are not independent witnesses. Evidence of victim Savitaben is not trustworthy piece of evidence having number of contradictions, improvements and basic infirmities. Substantial corroboration is missing. FSL report does not support the basic story of the prosecution and it contradicts materially the version of the prosecution. It is argued by ld. counsel Mr. Supehia that on the contrary, it emerges from the record that this victim Savitaben must have developed some personal relations with accused No.1 Ramesh Tiwari and, therefore, under the pretext of sickness, she had not gone for labour work on 31.3.1998 and had voluntarily joined the accused and had stayed overnight with him. If the Court reaches to a conclusion that she had sexual relations/ intercourse with any of the accused and especially accused No.1 Ramesh Tiwari, then in that case also, the trial Court ought to have held that this is a case of consent. Complaint has been filed under the guidance of elder brother of the husband of victim Savitaben with a view to get compensation of Rs. 25,000/ from the State Government. Mr. Supehia has also pointed out from record that Savitaben being a tribal lady, was entitled to the compensation of Rs. 25,000/ if she is the victim of rape. She has also claimed the amount and she has been paid the amount of Rs. 25,000/. Mr. Supehia has also pointed out that there are circumstances on record which are suggestive of one fact that if she would not have been agreed for filing complaint, then she might have been killed or otherwise seriously assaulted by her husband or relatives of the husband. That if that finding recorded by the ld. trial Judge is appreciated in correct perspective, then it deserves to be reversed.

5. On the other hand, ld. APP has submitted that ignoring all evidence led by the prosecution, the accused can be held guilty only on the evidence of victim Savitaben. FSL report substantially supports the case of the prosecution. Merely because she is aged 20 years of age and married woman, having no sign of rape on the body on the date on which she was examined by the doctor, would not give rise to any presumption against her and her evidence has been rightly accepted by the trial Judge. Ld. trial Judge has taken all care in appreciating material relevant part and, therefore, appeal should be dismissed. According to ld. APP, no Indian woman would concoct a story that two different persons have committed rape frequently on her only to get the amount of compensation paid by the State Govt. by way of solace. Non-disclosure of story of rape committed

on her till arrival of her husband is a natural conduct and it would not be proper to say that this is a case of delayed FIR. Failure on the part of the complainant Savitaben to disclose offending act committed by the appellants accused to her brother-in-law PW Jamu when she was located by him, does not go to the root of the merits of the case of the prosecution. Discrepancies reflected in the evidence of prosecution and some improvements made by the prosecution witnesses including some exaggerations should be ignored and ld. trial Judge has rightly ignored the same. Merely because some circumstances leading to the case of consent has scope to emerge, even than maturity of age, her marital status are not relevant factors in such case.

6. To appreciate the legality and validity of the impugned judgment, evidence led by the prosecution, in light of oral submissions made by the ld. counsel appearing for the parties, require fresh evaluation with utmost care and caution because two accused have been held guilty for the offence of rape by abducting her from her dwelling house in the evening part of the day. Mr. Supehia has rightly pointed out that there are material contradictions as to the cause for not going for labour work on 31.3.1998, the day of incident so far as victim Savita is concerned. At initial stage while lodging complaint before the police, it is said that as she was not feeling well, she had not gone for labour work and in her deposition, she has stated that as she had not got work on that day, she had not gone for labour work. Husband of Savita namely PW Ima has remained silent in his examination -in-chief as to why she had not gone with him for labour work. By not going, any covenience was created by her is the question raised. Story of arrival of both the accused at the place where Savita was residing with other villagers in the open area, in autorickshaw, is also not established beyond doubt. During the course of investigation, no rickshaw has been traced. Obviously, therefore, there is no evidence of rickshaw driver available. No independent witness qua incident has stated during the trial that two persons had come to call Savita in autorickshaw. There is no legal and genuine evidence on record to show that any witness in the locality had seen Savita boarding rickshaw either with the accused or with any unknown persons. Scope of availability of independent witness was there. It is not on record that any of the persons residing in the camp site where Savita and her husband Ima were camping with family members or relatives have stated that some of them were knowing the accused or any of them. On the contrary, totality of evidence gives an impression that

entire group including victim Savita and her husband Ima once were working near Vesu Patiya where construction of school building was going on and have shifted to the place from where victim Savita was allegedly abducted. Undisputedly, both the accused persons were serving as Watchmen at Vesu Patiya where construction of school building was going on. It is also in evidence that both the accused had acquaintance with Savita. Age of accused no.1 Ramesh is around 27 years and accused no.2 Rajesh is of 25 years of age. If the case of the prosecution is presumed to be correct that on hearing message from the accused that the husband of victim Savita had met with accident, victim Savita would not have sat silently or have joined the accused and boarded in rickshaw. Her natural conduct would be very much different. She would try to inform maximum number of people in the vicinity as they were from her own village to rush to rescue and help her. At least, she could have requested some of them to follow the rickshaw so that she can get assistance in the event of need. Her conduct after reaching at a distant place i.e. near Vesu Patiya is also not natural. Her evidence is silent qua conversation in autorickshaw till she reached Vesu Patiya. She had not cared to inquire about her husband. It is not in evidence that the room wherein the accused no.1 was residing is a lonely place and nobody can reach to her rescue even if she would have shouted for help. On careful reading of examination-in-chief, it transpires that she had never resisted her entry into the room where she was allegedly detained and raped. Payment of rickshaw charges by accused persons, act of entry of victim Savita in the room of accused and her stay during whole night in the said room, are very relevant and the same has not been appreciated in proper perspective by the trial Court. Learned trial Judge has accepted the each word of PW Savita as gospel truth. It is not on record and is not proved beyond doubt that both the accused at relevant point of time, were residing in the same room. After leaving the room of the accused in the early morning at about 5.00 A.M., her conduct of sitting quietly at the edge of the public road up to 10.00 A.M. in the morning till her brother-in-law PW Jamu located her, is full of doubt and is improbable. On the contrary, it gives an impression that as victim Savita did not return till early hours of morning, relatives of Savita must have started search and ultimately she was found either near the house of the accused or in that area. According to prosecution, Savita did not disclose any fact and especially fact of rape committed on her to PW Jamu. Oral evidence led by prosecution materially contradicts as more than two witnesses have said in their deposition

including PW Jamu that they were appraised about the overt act of the accused person. It is in evidence that she was afraid of her husband and other elderly persons as she had stayed outside the house during whole night. Victim Savita herself has stated that she had unfolded whole story to PW Jamu and thereafter Jamu took her to Adajan. One witness has said that he had realised that some unfateful act was committed. It is in her evidence that her brother-in-law (Jeth) Ramsing is PSI and even then the prosecution has failed to bring cogent evidence on record to prove that when the accused took her in autorickshaw, some persons were present there. It is also in evidence that on her return from Vesu Patiya after the fateful night, she has mostly acted as per the wish and directions of her husband Ima and Jetha PSI Ramsingh. She was also under threat to receive Fargati (divorce). She has also confessed that she has given evidence because of the fear of her Jeth and her husband. PSI Ramsing was also there in the hospital when she was taken for medical examination. It is stated by her in para-2 of her cross-examination, in the days of incident, this PSI Ramsing had been there since four to five days and on the day of incident till evening, PSI Ramsing was there. So, ld. trial Judge ought not to have accepted the evidence of victim Savita as evidence of truthful witness. She does not get material corroboration from any of the witnesses. On the contrary, her husband Ima has stated that on his returning home, he found that his wife is missing and so he asked others about her. Not only that, he requested others to make inquiry. None of them had informed Ima that Savita was seen leaving the place in autorickshaw with accused of with two unknown persons. He also admits that his brother Ramsing is PSI, but he denies the presence of his brother-PSI Ramsing on the day of incident. This material contradiction in the evidence of prosecution affects the trustworthiness of both the prosecution witnesses. Of course, PW Ima has admitted that they have received Rs. 25,000/ by way of compensation from Social Welfare Department. There is no worth in the evidence of PW Jamu Damor. It is the evidence with full of contradictions and improvement qua the first story disclosed before the police. He is illiterate rustic tribal and he has admitted that he has stepped into witness box and has given deposition as per the wish of PSI Ramsing and husband of victim Savita. Other witness P.W. Maka Badhia - uncle of PW Imabhai also admits that PSI Ramsing was present on the day of incident, be denies that Ramsing had accompanied Savita when she had been to police station for lodging FIR. Evidence of PW Maka Badhiya exh.53 makes the story of the prosecution more improbable. According to this witness,

not only PW Jamu, but other prosecution witness namely PW Raman Valji had been to Vesu Patiya and PW Raman Valji had asked Savita regarding her overnight stay outside and victim Savita had told him that she was taken by accused persons and has been raped. In cross-examination, PW Maka Badhiya has stated that he had seen bleeding injury on the person of Savita. He accompanied Savita to the hospital. He has also admitted that in absence of Ima -while on work-, if Savita goes out for long, there were quarrels. Displeasure of PW Imahusband of victim Savita resulting into personal quarrels between husband and wife when she was leaving residence in absence of her husband, reflected in the evidence of this witness, is very relevant when Investigating Officer himself has admitted in his deposition that there is conflicting evidence as to the character of Savita and was living adulterous life. P.W. 10 Raman has stated one fact during the cross-examination that on finding Savita near Vesu Patiya, PW Jamu had given her two slaps and thereafter she had started whipping. This part of the story is not told either by PW Jamu or by victim Savita. So, ld. trial Judge is not correct in recording that there is sufficient reliable ocular evidence on record to link the accused with crime.

7. Evidence of PW.12 Dr. Hetalben who is a Gynecologist, is also relevant. She has stated that there were no injuries on the person of the victim Savita. Ld. trial Judge ought to have held that story of the accused coming in rickshaw is totally improbable and has not been proved beyond doubt. Unless any of the accused is informed that Savita has not gone for labour work and her husband has gone for work and Savita is alone at the place of dwelling, they had no reason or scope to come to Adajan with rickshaw to carry victim Savita with them under the pretext that her husband has met with an accident. The case of the prosecution should stand on its own legs convincingly. The conduct of the star witness Savita is not natural on each occasion especially from when she was informed about her husband meeting with accident till she was taken to the hospital for medical examination. This is full of contradictions and improbabilities. She had not acted or reacted in usual manner on all occasions and it goes to the root of the trustworthiness of this witness. For example, till room of the accused was closed from inside, she was not given any threats or was asked to succumb to the wishes of the accused.

8. Opinion evidence is against the basic story and it reveals contrary. Semen found on the piece of cotton

cloth, is not explained by the prosecution especially when her petticoat and blouse are not found with stains of any kind whatsoever either of blood or of semen. Cotton short (chaddi) of dark brown colour undisputedly of victim Savita is found stained with semen at four places. Serological examination conducted by FSL indicates that semen found on short is of "B" group which was also found on the cotton cloth. Same is the case with semen found on the cover of cotton mattress. But it is not proved by the prosecution that blood group of husband of Savita is of different group than the semen of "B" group found on the clothes. It is also not opined by the FSL that blood taken from the body of accused no.2 Rajesh is of "B" Group and serological examination has remained unconclusive qua the group of semen of accused no.2 Rajesh. So, there is nothing on record that accused no.2 Rajesh was having same "B" blood group. This clinches the story told by victim Savita that both the accused have raped her frequently around four times during whole night and thereafter, pushed her out in the early hours of next day. On the other hand, if FLS report is considered, it transpires that one of the accused i.e. accused no.1 Ramesh might have established sexual relationship including intercourse . If it is believed for the sake of arguments that accused no.1 must have sexual intercourse with Savita, even than it would be illegal to hold that this act was of rape i.e. sexual intercourse without her consent and against her wish. Undisputedly, Savita is a matured lady. She was knowing accused no.1 since she was doing labour work near Vesu Patiya. She had left the place on the day of incident in the late evening and prior to arrival of her husband from the place of work. There was no reason for her to leave the camping place and story of the prosecution on this aspect is very much doubtful. It is likely that she must have left the place and joined the accused or accused no.1 at any subsequent point of time. Scope of pre-meetigation of mind between accused no.1 and Savita or her reaching near Vesu Patiya where accused no.1 was residing, at her sweet will, has emerged. Ld. trial Judge has ignored all these aspects. On reading the judgment of the trial Court, it is clear that the defence counsel has argued before the trial Court that accused should be acquitted by turning down the story of the prosecution or atleast it should be held that this is a case of consent. But the same is not accepted.

9. It is not necessary for the accused to plead specifically in such case that this is a case of willing venture, but it is obligatory on the part of the Court to examine the case in the context of truthfulness of

evidence led by the prosecution with great care and caution. Evidence of each witness has to be scanned carefully and rescanning of entire set of evidence is also simultaneously required. Checking and cross-checking, if not made, then prosecution may settle the score by material improvement and convincing omissions. In the present case, ld. trial Judge has committed grave error in appreciating the evidence. The basic legal principles relating to appreciation of evidence are ignored and, therefore, incorrect finding has been arrived at. Ld. counsel Mr. Supehia has submitted synopsis of arguments which is on record, in support of his submissions. I am in agreement with Mr. Supehia that both the accused deserve acquittal. This Court can positively record that ld. trial Judge ought to have acquitted accused no.2 holding that he has been wrongly implicated for the offence of rape and there is no convincing evidence to link him with crime. So far as accused no.1 is concerned, element of rape as defined in IPC has not been established by the prosecution beyond doubt. In short, the impugned judgment requires to be quashed and set aside and accused require to be acquitted.

10. For the reasons aforesaid, appeal is allowed. The impugned judgment dated 27.7.2000 passed by ld. Addl. Sessions Judge, Surat in Sessions Case No. 34 of 1998 holding both the accused guilty for the offence punishable under Section 366, 376 and 114 of IPC and sentencing them as aforesaid, is hereby quashed and set aside. The appellants-accused are hereby acquitted of the offences for which they are convicted and are hereby ordered to be set at liberty forthwith, if not required to be detained in any other case. Fine if paid, be refunded.

Yadi to concerned court and Baroda Central Prison.

21.3.2002 [C.K. BUCH, J]

*rawal